No. 524

PETITION FOR CERTIORARI

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

CHARLES LOUIS d'ESPINAY-DURTAL,
Petitioner,

against

JOHN WAKEFIELD HARRIS and ELIZABETH MARSHALL HARRIS, Infants, by IRVING DROUGHT HARRIS, their Guardian *ad litem;* GUARANTY TRUST COMPANY of NEW YORK, as Trustee; ANTHONY J. ROMAGNA, Guardian *ad litem* of CHANTAL LOUISE MARIE FRANCOISE d'ESPINAY, Infant; THOMAS W. CORLEY; HERVE NEAU; JESUS ARRUTIA; ANNA ARRUTIA; MARGUERITE ARRIETA; THERESE ARRIETA; A. J. HITCHMAN-ILES as Executor of the last Will and Testament of HENRIETTA FERRIS; THOMAS BYRON GILCHRIST as Ancillary Executor of the last Will and Testament of JEAN FERRIS d'ESPINAY-DURTAL; ROBERT M. COWEN, as Ancillary Executor of JOSEPHINE GROVE,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK.

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PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioner prays that a writ of certiorari issue to review the decision and order of the Court of Appeals of the State of New York entered in the above entitled case on May 24th, 1957.

Citations to Opinions Below.

Prior opinions of the Appellate Division and of the Court of Appeals of the State of New York in this matter not directly involved are reported in 276 App. Div. 990 and 302 N. Y. 752, respectively under the title of *Matter of Harris (Guaranty Trust Co. of N. Y.)*. The opinion of the Referee, affirmed in toto by the Supreme Court of the State of New York (R. 24-92) is unreported but will be found at R. pp. 93-260 and particularly at R. pp. 140-163 of the certified record. The opinion of the Appellate Division of the Supreme Court printed in Appendix A hereto, *infra*, p. ix (R. 1030-1039), is reported in 286 App. Div. 794 under the title *Matter of Ferris*. The opinion of the Court of Appeals of the State of New York printed in Appendix A hereto, *infra*, p. i is reported in 3 N. Y. 2d, 70 under the title *Matter of Ferris*.

Jurisdiction.

The judgment of the Court of Appeals was entered on May 24, 1957. Re-hearing was denied on July 3rd, 1957 (amended remittitur duly certified and prefixed to record).

How Federal Questions are Presented.

There are two federal questions here sought to be reviewed.

The first involves Article I, Section 10 of the United States Constitution, prohibiting the impairment of the obligation of contracts. It was first raised when the Supreme Court of the State of New York (R. 24-92) affirmed the report of the referee and applied a statute (Rule 30 of the Rules of Civil Practice of the State of New York) as it read in 1948 (R. 168) as justifying the commutation of peti-

tioner's annuity. If commutation was permissible, the applicable statute was the statute as it read in 1941 when petitioner's rights became vested. In 1941 commutation of petitioner's annuity was prohibited by the statute "without the consent of the annuitant." The petitioner has never consented to the commutation of his annuity.

The second federal question sought to be reviewed involves Section 1 of the Fourteenth Amendment to the United States Constitution prohibiting a state from depriving any person of property without due process of law. This question was first raised by the opinion and order of the Appellate Division (Appendix A, pp. ix-xiii, *infra*) wherein that court retroactively commuted the annuity granted to your petitioner. Prior thereto commutation of petitioner's annuity had been prospective. In its amended remittitur the Court of Appeals of the State of New York on July 3rd, 1957 stated:

> "Upon the appeals herein there was presented and necessarily passed upon a question under the Constitution of the United States, viz.: whether the retroactive commutation of appellant Charles Louis d'Espinay-Durtal's annuity as of the date of his wife's death violated his rights under the Fourteenth Amendment. The Court of Appeals held that there was no denial of any constitutional right of said appellant."

Questions Presented.

1. Whether commutation of petitioner's annuity without his consent, when the relevant statute in force at the time he acquired vested rights under his wife's will required his consent to commutation, impaired the obligation of a contract under Section 10, Article I of the United States Constitution.

2. Whether retroactive commutation by the courts of a state on May 24th, 1957 of a common-law annuity effective on September 19th, 1941 is a violation of the Fourteenth Amendment of the federal constitution, prohibiting a state from depriving a person of property without due process of law.

Constitutional Provisions and Statutes Involved.

The constitutional provisions involved are Article I, Section 10 and the Fourteenth Amendment, Section 1 of the Constitution of the United States which, insofar as material, read as follows:

> "No state shall • • • pass any • • • Law impairing the Obligation of Contracts" (Article I, Section 10).
>
> "No state shall • • • deprive any person of • • • property without due process of law; • • •"
>
> (Fourteenth Amendment, Section 1).

The statute involved is Rule 30 of the Rules of Civil Practice[1] as it existed in 1941 when petitioner's right to the annuity became effective as a result of his wife's death and as it existed after the 1948 amendment. So far as material here, that statute prior to the 1948 amendment read:

> "*If such petitioner consent to accept a gross sum in lieu of yearly interest* or income for life of a sum of money paid over into court for his benefit • • • the same shall be estimated according to *the then value* of an annuity at the rate of five per centum on the principal sum, during the probable life of such

[1] The Rules of Civil Practice have been given the force and effect of statutes by the legislative declaration that such rules shall be "binding on all the courts in this state and on all the justices and judges thereof" (*Matter of Moore*, 108 N. Y. 280).

person, according to the American Experience Table of Mortality." (Italics added.)

So far as material here, that statute after 1948 read:

> "If a gross sum is payable to a party in lieu of yearly interest or income for life of a sum of money paid into court for his benefit * * * such sum shall be calculated according to *the then value* of an annuity at the rate of four per centum on the principal sum compounded annually, during the probable life of such person according to the American Experience Table of Mortality * * *" (1948 Amendment effective April 15, 1948). (Italics added.)

In one form or another, this statute has existed in the State of New York since prior to 1849.

Statement.

Jean Ferris, then an unmarried infant, effected a marriage settlement trust under the jurisdiction of the English Court of Chancery on July 25th, 1929, in contemplation of her marriage to Irving D. Harris. She married Harris on October 19th, 1929 and there were two issue of that marriage.

On July 27th, 1931, pursuant to certain powers reserved in said English trust, that instrument was amended with the approval of the English Chancery Court by a deed of variation. As so amended, its situs was transferred to the State of New York. The Guaranty Trust Company of New York was named as and is still the Trustee thereof, and New York law was stated in the instrument of transfer to govern its administration. A power was reserved by Jean Ferris, the Settlor, to appoint an annuity, chargeable upon the whole or any part of the trust fund, not in excess of

$25,000 a year in favor of the husband of any marriage of the Settlor.

In January, 1932, Mr. and Mrs. Harris went to Europe and took up their residence in France. On July 7th, 1936 the French courts granted a divorce to the then Mrs. Harris and thereafter and on April 20th, 1938 she married the petitioner d'Espinay and acquired French citizenship. On October 12th, 1939 the respondent, a daughter, Chantal, was born of this marriage. On May 23rd, 1938 the Settlor, now Jean Ferris d'Espinay-Durtal, executed a will. By a codicil to her will, dated October 10th, 1939, the Settlor exercised the power of appointment reserved to her in the marriage settlement trust to appoint an annuity to the husband of any marriage by appointing "to my said husband, Charles Louis d-Espinay-Durtal, during his life, an annuity of $25,000". The Settlor died on September 19th, 1941. Subsequently, by decree of the Surrogate's Court of New York County, a duly authenticated copy of said Last Will and Testament was directed to be recorded and ancillary letters testamentary upon said will were issued to respondent Gilchrist. Thereafter, the codicil dated October 10th, 1939, which exercised the power of appointment granting d'Espinay an annuity of $25,000 per annum, was duly admitted to probate in the Surrogate's Court of New York County.

Litigation thereupon ensued between, among others, Jean's first husband Harris, and their then minor children on the one hand and d'Espinay and his minor child by Jean on the other. The Court of Appeals of the State of New York in *Matter of Harris* v. *Guaranty Trust Company of New York*, 302 N. Y. 752, decided April 12th, 1951, affirmed without opinion the order of the Appellate Division, First Department reported in 276 App. Div. 990, and determined, among other things:

1. That the divorce decree obtained by the then Jean Ferris Harris against Irving D. Harris in France on July 7th, 1936 was valid (R. 94-95);

2. That the Settlor's subsequent marriage on April 20th, 1938 to your petitioner herein was valid (R. 95);

3. That the appointment of the annuity of $25,000 a year in favor of the petitioner was valid (R. 95);

4. That in the further consideration to be given outstanding matters by Special Term of the Supreme Court of the State of New York, it, in its discretion, might consider the desirability of commuting d'Espinay's annuity and, if deemed desirable, it was directed to determine the commuted value of the annuity and pay over the capital sum to the annuitant d'Espinay, less estate taxes apportioned thereon (R. 97).

As the minority of the New York Court of Appeals correctly noted in its 1957 decision,

> "Neither by her trust instrument nor by her will did Mrs. Harris direct or mention the commutation of this annuity. The idea of commutation was first proposed not by Mrs. d'Espinay but by the Appellate Division in March, 1950 in deciding an appeal in a former appeal in this proceeding. • • • Not only did the decedent fail to provide for commutation but, as the referee observed, until the decision by the Appellate Division in 1950 'throughout this litigation no question was ever raised by any of the parties concerning the commutation of the d'Espinay annuity;' " (3 N. Y. 2d 70, Appendix A, *infra*, pp. v, viii).

Special Term of the Supreme Court of the State of New York, affirming the Referee theretofore appointed, directed

"present" commutation, fixing as the date for commutation the date of final decision of the Court of Appeals upholding petitioner's right to the annuity (R. 103-104, 81-82).

On December 20th, 1955 (R. 1017), over 14 years after the death of the Settlor, Jean d'Espinay-Durtal, the Appellate Division of the First Department commuted the annuity retroactively to the date of Jean's death on September 19th, 1941 (Appendix A, *infra*, p. xii). Appeal was taken from this order to the Court of Appeals of the State of New York by the petitioner (R. 1009-11). That court affirmed the court below on May 24th, 1957 (Appendix A, *infra*, pp. i-ix). However, two of the seven judges who sat did not agree with the opinion of the other five, and stated:

> "The *retroactive* commutation of the annuity belonging to decedent's second husband is contrary to law, in my opinion, and deprives him of property without due process of law in violation of the federal and state constitutions" (Appendix A, *infra*, p. iv).

Reasons for Granting the Writ.

1. There are three types of annuities: (a) gift of a sum to purchase an annuity; (b) gift of a trust to pay an annuity; (c) common-law annuity. As we will show by reference to the relevant document (*infra*, pp. 14-15), the type of annuity granted the petitioner was a common-law annuity.

Whenever commutation of a common-law annuity has been ordered it has always been pursuant to some statutory

authority. Indeed, where the Appellate Division of the Supreme Court of this State permitted, as it did, a direct commutation of an annuity without reference to Rule 30 of the Rules of Civil Practice, the Court of Appeals of New York held that there can be no commutation and reversed the decision of the Appellate Division permitting it.[2] Statutory authority to commute in certain cases has existed for many years in connection with real estate (see New York Code of Civil Procedure, Section 1569, later Civil Practice Act, Section 1052; New York Real Property Law, Sections 107, 480, 481, 490 and 438).

Recently the New York Civil Practice Act was amended with respect to real property matters to allow commutation pursuant to a statutory formula "affecting no pending action or proceeding" (Sections 1052, 1053, 1053a, and Article 80a of the Civil Practice Act, as enacted by Chapter 847, Laws of New York, 1947).

Commutation was directed by the State Supreme Court which affirmed in toto the opinion of the Referee who held that the only proper method of commutation is that stated in Rule 30 of the New York Rules of Civil Practice (R104, 155, 168-169). The Appellate Division, in modifying the order of the New York Supreme Court, and the Court of Appeals, must have acted under that statute as that is the only statutory authority for commutation of an annuity of personalty and reference thereto is made in the minority opinion of the New York Court of Appeals (Appendix

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[2] "In the circumstances disclosed by this record we need no canon of construction to justify our conclusion '• • • except, indeed, the primary one, to which all others are subordinate, that the intention of the testator is to be found in all his words and when ascertained is to prevail' " *Matter of Maybaum*, 296 N. Y. 201, 205 (1947)

A, p. vi, *infra*). It was also regarded as controlling by counsel for the Harris children in the Court of Appeals since at pp. 25-26 in their brief in that court they said:

> "• • • Rule 30 remains the 'standard' for computing future interests and was undoubtedly in the mind of the Appellate Division when it gave Special Term the power to 'determine the commuted value of the annuity' and the discretion to direct payment as in the children's interest."

2. Rule 30, as it existed at the time of the Settlor's death in 1941 and for many years prior thereto, required the consent of the annuitant as a condition of commutation (pp. 4-5, *supra*). In 1948 Rule 30 was amended so that the annuitant's consent was no longer required (p. 5, *supra*). Both in 1941 and 1948 the Rule required "present" commutation.

3. Jean, the Settlor, died in 1941. The right of the petitioner to receive the installments due under the annuity had become fixed and vested on the several anniversary dates since then (Appendix A *infra* p. V , *Kearney* v. *Cruikshank*, 117 N. Y. 95; *Matter of Toms*, 84 Misc. 312. 320, 321). Under Rule 30 of the Rules of Civil Practice, as it existed in 1941, there could be no commutation of petitioner's annuity without his consent. Petitioner never consented to the commutation of his annuity and no claim that he had has ever been made.

Upon Jean's death the rights of her legatees became vested and these rights may not be impaired by subsequent legislation (16 Corpus Juris Secundum, Constitutional Law 1198, Section 228). This general statement is the law under the New York State and United States constitutions.

> "Since rights of descent and distribution of a decedent's estate are created by the law of the state,

the state may change or take away such rights *though it may not take away property 'which has vested by virtue of such rights'.*"

Matter of McGlone, 284 N. Y. 527, at 533; aff'd 314 U. S. 556.

"Like other rules of descent it was subject to change by the law-making power as to any land not already passed to the heir by the death of the owner. Not until the ancestor dies is there any vested right in the heir (Cooley's Constitutional Limitations, 7th Ed. 512)." *Jefferson* v. *Fink*, 247 U. S. 288, 294.

By utilizing the 1948 version of Rule 30 of the New York Rules of Civil Practice (R168), which permits commutation without regard to the annuitant petitioner's consent, rather than the statute as it read in 1941, which required it, the courts of New York, including the Court of Appeals, clearly violated annuitant petitioner's rights under Article I, Section 10 of the United States Constitution.

Columbia Railway, Gas and Electric Company v. *State of South Carolina*, 261 U. S. 236.

The Courts of the State of New York, including the Court of Appeals, gave retroactive effect to the 1948 statute and violated the contract rights which petitioner was granted under the 1941 statute, i.e. the right to prevent the commutation of his annuity without his consent. By so doing the state court deprived petitioner of the right, vested in him under the 1941 statute, not to be deprived of the annual annuity installments accruing each year after 1941, without his consent.

4. By approving retroactive commutation of petitioner's annuity the court below deprived petitioner of vested rights, in violation of Section 1 of Article XIV of the Constitution. We recognize that the constitutional guarantee against the impairment of contracts, discussed

in paragraphs numbered 1-3 above, applies only to legislative action.[3] The protection against deprivation of property without due process is not similarly restricted and applies to action by judicial decision (*Brinkerhoff-Faris Co.* v. *Hill*, 281 U. S. 673, 680 (1930)), whether such decision results in the unconstitutional taking because the courts ignore a property right derived through statute[4] or by prior decision.[5] Here the New York courts have violated petitioner's rights under both heads. By ignoring the provision of Rule 30 of the Rules of Civil Practice requiring petitioner's consent to commutation and requiring "present" commutation (Statute in 1941, *supra*, p. 4) and by ignoring the provisions of the amended Rule in 1948 requiring present commutation (*supra*, p. 5) and by retroactively applying the amended rule to destroy vested rights accrued under the Statute in 1941, the New York Court of Appeals has violated petitioner's rights under the due process clause.

We recognize that reversal by a state court of a former decision to the prejudice of an individual will not permit him to invoke the Fourteenth Amendment.[6] We do claim that under *Kearney* v. *Cruikshank*, 117 N. Y. 95 (cited in the majority opinion and relied on in the dissent below), "the right of the annuitant to receive the installments due under the annuity became fixed and vested on the several anniversary dates" (See dissenting opinion, Appendix A,

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[3] *Fleming* v. *Fleming*, 264 U. S. 29, 31 (1924).

[4] *Steamship Company* v. *Joliffe*, 69 U. S. [illegible] (1864) and *Coombes* v. *Getz*, 285 U. S. 434, 448 (1932). Contract right derived through statute.

Ettor v. *Tacoma*, 228 U. S. 148, 156, 158 (1913). Property right derived through statute.

[5] *Muhlker* v. *Harlem Railroad Co.*, 197 U. S. 544, 570, 575 (1905).

[6] *Neblett* v. *Carpenter*, 305 U. S. 297, 302 (1938).

infra, p. v) and that, in addition, under Rule 30 as it existed in 1941 petitioner's annuity could not be commuted by judicial decision either retroactively or without his consent. Property rights were created of which petitioner may not be deprived without compensation. The specific form of property involved is a contract right since it was created by a trust deed. *Coolidge* v. *Long*, 282 U. S. 582, 596 (1931). This Court has held that the taking of a contract right, whether derived through statute[7] or by unreversed case law, is a deprivation of property without due process.[8]

It is therefore immaterial under the due process clause of the XIV amendment, whether the destruction of petitioner's vested rights involves a taking of property created by contract or otherwise. Its taking without compensation will not be tolerated by this Court.

The decision below deprives petitioner of $248,713.23 without regard to federal income taxes and if federal income taxes be considered the deprivation is $281,092.05 (Appendix B, *infra*, p. xvi).

Whether a change in judicial decision shall be prospective or retroactive is controlled by judicial policy as determined by the state courts. *Great Northern Railway* v. *Sunburst Co.*, 287 U. S. 358, 364-366 (1932). The courts of New York have uniformly held that retroactive operation is not permissible where vested rights are involved.[9]

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[7] *Steamship Company* v. *Joliffe*, 69 U. S. [redacted] (1864) and *Coombes* v. *Getz*, 285 U. S. 434, 448 (1932). Contract right derived through statute.

Ettor v. *Tacoma*, 228 U. S. 148, 156, 158 (1913). Property right derived through statute.

[8] *Muhlker* v. *Harlem Railroad Co.*, 197 U. S. 544, 570, 575 (1905).

[9] *People ex rel. Rice* v. *Graves*, 242 App. Div. 128, aff'd 270 N. Y. [redacted] Cert. Den. 298 U. S. 683, *Brown* v. *Utica Mutual Insurance Co.*, 53 N. Y. S. 2d 760, 765. The New York rule is also the rule of this Court. *Griffin* v. *Illinois*, 351 U. S. 12, 26 (1956).

5. The majority of the New York Court of Appeals approved commutation "in conformity to the mortality tables as of the date of his" (petitioner's) "wife's death", i.e., in 1957 the court applied tables applicable in 1941 (Appendix A, p. iii, *infra*). It ignored the provision of the Statute requiring petitioner's consent (p. 4, *supra*). The minority said: "Computing the capital equivalent as of an earlier date is a contradiction in terms. That is to say, the lump sum cannot be equivalent in value to the annuity if it is computed as of some previous time. That is inherent in the fact that the longer a person lives, the greater becomes his probable life span. A year that is lived out reduces life expectancy by less than one year. • • • The length of the life span of a person is of course the important variable in determining the value of an annuity" (Appendix A, *infra*, p. vii).

Applying in 1957 tables applicable in 1941 in computing the value of petitioner's annuity is not only a "contradiction in terms"; it deprives petitioner of 4½ years expectancy according to the tables.[10]

The majority of the court below justified this by stating that "The gift of such an annuity is equivalent to a legacy of the principal value of the annuity (*Matter of Cole*, 219 N. Y. 435)." (Appendix A, *infra*, p. iii.) Heretofore, both by statute[11] and by unvarying court decision[12], present commutation is alone permissible (R. 157).[13] Evasion of

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[10] American Experience Table of mortality.

[11] Rule 30, Rules of Civil Practice, see note 1, p. 4, *supra*.

[12] *Dunham* v. *Deraismes*, 165 N. Y. 65; *Buchanan* v. *Little*, 154 N. Y. 147; *Peoples Trust Company* v. *Flynn*, 188 N. Y. 385, 392; *Matter of Fenton*, 123 Misc. 658, 666, aff'd 214 App. Div. 754.

[13] "I have found no case nor has any been cited • • • wherein the Court has commuted an annuity *nunc pro tunc* to the date of death of the testator or donor, where accrued installments had already become payable • • •"

this uniform rule was justified by the majority on the alleged authority of the *Cole* case (*supra*).

We have already shown that there are three types of annuities: (a) gift of a sum to purchase an annuity; (b) creation of a trust to pay an annuity; (c) common-law annuity. *Matter of Cole, supra*, dealt only with type (a) above, which permits the annuitant legatee to elect to take the principal sum.[14] This right was specifically denied petitioner in the case at bar (R. 1031, Appendix A, *infra*, p. ii) and it is clear that the annuity here involved is a common-law annuity. The trust under which the petitioner received his annuity, so far as material, provides:

> "The Settlor (Jean d'Espinay) may by will or codicil appoint to and for the benefit of any husband who may survive her during his life or any less period an annuity charged on or payable out of the whole or any part of the trust fund not exceeding ($25,000) per annum upon protective trusts for the benefit of such husband or otherwise and subject to any condition she may think fit."

Acting under this reserved power, Jean appointed "to my husband Charles Louis d'Espinay-Durtal during his life, an annuity of $25,000."

In *Matter of Cole, supra*, the instrument creating the annuity provided:

> "The same sum of $10,000 shall be expended in each case for an annuity as above provided for each one of the following named individuals." (*Matter of Cole*, 219 N. Y. at p. 437.)

It is therefore wholly clear that the annuity in *Matter of Cole* was, to use the language of the majority of the court

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[14] At common law the right to receive a capital sum in lieu of the payments directed arose only when the executor was directed to purchase an annuity. (*Matter of Cole*, 219 N. Y. 435, 438; • • •)" *Matter of Maybaum*, 296 N. Y. 201, 205.

below, "equivalent to a legacy of the principal value of the annuity" (Appendix A, *infra*, p. iii) and the annuity to the petitioner, just as clearly, was not.

Therefore, reliance on the *Cole* case by the court below to justify its action is without support and results in a taking of petitioner's property without due process.

6. Clearly the questions presented are of importance since the first directly affects the extent to which by retroactively applying an inapplicable statute the courts may deprive an individual of rights vested in him under the contract clause by a prior applicable statute, and the second affects the permissible method under the constitution of commuting common-law annuities. As the dissenting judge in the Court of Appeals said,

> "The retroactive commutation of the annuity • • • is contrary to law • • • • and deprives (petitioner) of property without due process of law in violation of the federal and state constitutions."

Conclusion.

For the foregoing reasons this writ for certiorari should be granted.

Respectfully submitted,

GEORGE A. SPIEGELBERG,
LAURENCE ROSENTHAL,
Counsel for Petitioner.

September 27, 1957.

APPENDIX A.

In the Matter of JOHN W. HARRIS *et al.*, Infants, by IRVING D. HARRIS, Their Guardian ad Litem, *et al.*, Appellants, to Compel an Accounting by GUARANTY TRUST COMPANY OF NEW YORK, as Substituted Trustee of the Trust Created between JEAN FERRIS, as Settlor, and GUARANTY EXECUTOR AND TRUSTEE COMPANY, LIMITED, as Trustee, Respondent.

In the Matter of the Accounting of GUARANTY TRUST COMPANY OF NEW YORK, as Substituted Trustee of the Trust Created between JEAN FERRIS, as Settlor, and GUARANTY EXECUTOR AND TRUSTEE COMPANY, LIMITED, as Trustee, Respondent. CHARLES L. d'ESPINAY-DURTAL *et al.*, Appellants-Respondents; ANTHONY J. ROMAGANA, as Guardian ad Litem of CHANTAL L. M. F. d'ESPINAY, an Infant, *et al.*, Respondents-Appellants; THOMAS B. GILCHRIST, as Ancillary Executor of JEAN F. d'ESPINAY, Deceased, Respondent.

Decided May 24, 1957 under title *Matter of Ferris.*

DESMOND, J. We affirm in all respects the order appealed from which settles the account of respondent Guaranty Trust Company as trustee of an *inter vivos* trust created in 1929 by Jean Ferris d'Espinay who died in 1941. Of the numerous issues tendered by the parties we think it necessary to state our views as to one only.

By a codicil to her will Mrs. d'Espinay, exercising a power of appointment which she had reserved to herself in the 1929 trust indenture, appointed to her husband a $25,000 annuity chargeable upon the trust fund. Because of protracted and complicated litigation concerning the trust and concerning the will and codicil of Mrs. d'Espinay, the husband's annuity has not been paid except that $100,000 on account thereof has been advanced to the annuitant from the trust without prejudice to ultimate rights. The Appellate Division in the order now being reviewed here has (this is the second of two appeals to the court in the case) affirmed the Referee and the Special Term by directing

that there be paid to the husband-annuitant in satisfaction of the annuity, the commuted principal value thereof as of the date of his wife's death, of $347,025 (less estate tax of $94,449.27 apportioned against the annuity) plus interest at 6% from that same date.* The annuitant says that this result is "savagely inequitable" and an unconstitutional diminution of what he asserts is his vested right to the past due installments of $25,000 per year plus interest thereon and plus the commuted value as of the date of actual payment of the annuity.

On the first of the two appeals to the Appellate Division in this proceeding, that court held that on a proper showing of reasons therefor it would be licit to pay to the annuitant not the actual successive installments during his life but, instead, the computed capital value of the annuity. "As annuitant," wrote the Appellate Division, "d'Espinay does not have any right to elect to take his annuity in a capital sum; but on disclosure of all relevant facts and figures, if the court then deems it advisable for the interests of the children, primary object of the settlor's bounty, the court may compute and determine the commuted value of the annuity in the hands of the trustee, pay over such capital sum to the annuitant less estate taxes apportioned thereon and after paying the outright appointees, estate taxes and all expenses thereon, distribute the balance discharged of any lien, to the remaindermen or the guardians of their property appointed to receive the same" (276 App. Div. 990, 992). We affirmed (302 N. Y. 752) the earlier Appellate Division order which stated that holding that commutation might be permitted. Accordingly, by our affirmance of that earlier Appellate Division order, it has already been held by this court that the commutation of this particular annuity is within the discretionary power of the courts. And, even if that question of power were still open here, we would have to hold on the precedents that the power to commute exists as to this annuity (see *Buchanan* v. *Little*, 154 N. Y. 147, 152; *People's Trust Co.* v. *Flynn*, 188 N. Y. 385, 393).

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* The Court is in error in stating that the Appellate Division "affirmed the Referee and the Special Term etc.". The Appellate Division reversed the Special Term which had required "present" commutation. That this is so may be seen by referring to the top of p. iii.

When the case went back to the Referee after that earlier appeal to the Appellate Division, the Referee determined on the proof presented that there should be commutation in the interests of the children as remaindermen. He thereupon ordered that commutation be had as of the date of the determination of the first appeal in this court. Thereafter, the Appellate Division affirmed the Referee's direction that there be commutation but held that the principal value of the annuity should be computed not as of the date chosen by the Referee but as of the date of death of Mrs. d'Espinay. Translated into figures that holding of the Appellate Division on the second appeal means that the husband is to be paid about $250,000 (net after estate tax) as the principal value of his annuity in conformity to the mortality tables as of the date of his wife's death, plus interest at 6% thereon from the date of her death until paid, or about $15,000 per year interest, or about $500,000 "actual" total as of now.

"An annuity is a stated sum per annum, payable annually unless otherwise directed" (*Booth* v. *Ammerman*, 4 Bradf. 129, 133). The gift of such an annuity is equivalent to a legacy of the principal value of the annuity (*Matter of Cole*, 219 N. Y. 435). Ordinarily such an annuity runs from the date of the testator's death and the first annual payment is due, ordinarily, at the end of 12 months from the date of death and annually thereafter (*Kearney* v. *Cruikshank*, 117 N. Y. 95). It follows that if there is to be commutation the appropriate if not the only date for figuring the capital value is the date of the death of the testator since the will which gives the annuity speaks as of that date. The commuting power of the courts is to be exercised when the particular facts of the particular situation justify it. Investigation and determination of such facts necessarily take time, short or long. Here, unfortunately, that necessary time ran 15 years. But the right to commute and the date for commutation was not altered by that delay. The law has recompensed this annuitant for the delay, as it recompenses other litigants in other situations, by allowing him interest at the full legal rate. No legal

objection to the validity of commuting as of the date of the donor's death can be based on the fact that the annuitant, by the order here appealed from, gets a lesser total sum than if he were to be paid the $25,000 annual installments from the date of his wife's death until now, plus commutation now as of the present date or some other date long subsequent to the wife's death. Computation of the principal value of an annuity as of the date of a testator's death states a figure which must always be greater or less than the sum which the annuitant would in fact receive as the total of uncommuted annual payments between the date of the testator's death and the annuitant's own death. But invalidity of a commutation would not be proven at a future day by the eventual fact that the annuitant had lived a long time and so would have gotten more than the commuted value. Had this commuted value been computed and paid shortly after Mrs. d'Espinay's death and if her husband had then survived her by only a few months, the shoe would have been on the other foot and the principal amount paid to the husband would have been far larger than the actual annuity payments would have been for the short period after the wife's death. The commutation here was "retroactive" in the sense only that intervening litigation postponed, but did not change as to amount, the payment of the commuted principal sum.

The order appealed from should be affirmed, without costs.

Van Voorhis, J. (dissenting in part). The *retroactive* commutation of the annuity belonging to decedent's second husband is contrary to law, in my opinion, and deprives him of property without due process of law in violation of the Federal and State Constitutions. It has previously been held that by means of an *inter vivos* trust and the exercise by will of a reserved power of appointment, the late Jean Ferris d'Espinay established a valid annuity of $25,000 for the benefit of her husband, commencing upon her death September 19, 1941. The estate of Mrs. d'Espinay has been involved in litigation during the intervening 16

years, with the consequence that this annuity has not been paid. The right of the annuitant to receive the installments due under the annuity became fixed and vested on the several anniversary dates (*Kearney v. Cruikshank*, 117 N. Y. 95). Neither by her trust instrument nor by her will did Mrs. d'Espinay direct or mention the commutation of this annuity. The idea of commutation was first proposed, not by Mrs. d'Espinay, but by the Appellate Division in Mareh, 1950, in deciding an appeal, in a former appeal in this proceeding. The Appellate Division then said: "As annuitant, d'Espinay does not have any right to elect to take his annuity in a capital sum; but on disclosure of all relevant facts and figures, if the court then deems it advisable for the interests of the children, primary object of the settlor's bounty, the court may compute and determine the commuted value of the annuity in the hands of the trustee" (276 App. Div. 990, 992, affd. without opinion 302 N. Y. 752). Although that decision determined that commutation of the surviving husband's annuity could be directed by the court, it did not decide whether commutation should be directed, nor as of what date commutation could be directed if it were to be deemed advisable. The previous appeal held that the power to commute existed, but left the advisability and manner of its exercise to be determined in the litigation now before the court.

These aspects were carefully and thoroughly considered by the Referee to whom this matter was referred to hear and report. He recommended that the annuity be commuted but remarked that "It was not until the Appellate Division raised the question in its opinion that commutation * * * was first considered", and made his computations as of April 12, 1951, which is the date when the Appellate Division's order was affirmed by the Court of Appeals (302 N. Y. 752). He recommended recovery of accumulated unpaid annuity installments of $25,000 a year, minus the allocable share of the estate tax, which had accrued on each anniversary of the settlor's death until September 19, 1951. The Referee commuted future installments into a lump sum as of that date, which was the

anniversary date of the settlor's death nearest to the date of the decision by the Court of Appeals.

The Referee devoted many pages of his report to the correct date of commutation, stating:

"Commutation is thus prospective in operation. The annuitant never had the use or benefit of these accrued installments and should not be compelled to accept at this late date the accrued installments, discounted to the date of the settlor's death, which would be the result if commutation were decreed as of that date.

"I have found no case nor has any been cited to me wherein the Court has commuted an annuity *nunc pro tunc* to the date of death of the testator or doner, where accrued installments had already become payable under the terms of the will or trust instrument."

Cases were cited where annuities have been commuted currently but not retroactively: (*Buchanan* v. *Little*, 154 N. Y. 147, 152; *Dunham* v. *Deraismes*, 165 N. Y. 65, 70; *Central Trust Co.* v. *Falck*, 177 App. Div. 501, affd. 223 N. Y. 705; *People's Trust Co.* v. *Flynn*, 188 N. Y. 385; *Matter of Fenton*, 123 Misc. 658, affd. 214 App. Div. 754; *Matter of Chambers*, 167 Misc. 843, 845-846; cf. Rules Civ. Prac., rule 30, providing for commutation when a gross sum is payable at the "then value of an annuity").

The Referee's report was confirmed by Special Term, whose order was appealed to the Appellate Division which upheld commutation of this annuity, but computed it retroactively to the date of the settlor's death on September 19, 1941. Retroactive commutation reduced the annuitant's recovery, according to respondents, by $105,542.66, and more than this sum according to appellant. The reason assigned by the Appellate Division for this modification is that the date of Mrs. d'Espinay's death is certain, whereas the time when a court decree is entered is largely fortuitous, depending upon the varying circumstances of individual cases.

In my view, the reasoning of the Referee is correct. The purpose in commuting an annuity is not to add or subtract

from the amount which the testator or settlor has given to the annuitant, but to arrive at a capital sum presently payable which is equivalent in value to the annuity, taking into account an estimate of the uncertainties of human life from the time of commutation into the future. The object of commuting an annuity is convenience, to facilitate dispositions of property which otherwise would be liable to be frustrated by the complications of wills and trusts. Where an annuitant survives the termination of the measuring lives of a trust, for example, it is convenient to pay off the annuitant in a lump sum so as to enable the balance of the corpus to be paid to the remaindermen. The annuitant receives the equivalent in value of his annuity, insofar as that is capable of being computed. In order to reach that result, commutation has to be computed according to the mortality tables as of the date when the lump sum payment is made or directed to be paid.

Computing the capital equivalent as of an earlier date is a contradiction in terms. That is to say, the lump sum cannot be equivalent in value to the annuity if it is computed as of some previous time. That is inherent in the fact that the longer a person lives, the greater becomes his probable life span. A year that is lived out reduces life expectancy by less than one year. To illustrate, as the Referee pointed out, this annuitant was 39 years old when the settlor died in 1941. On the basis of the American Experience Table of Mortality, he then had a life expectancy of 28.9 years, but in 1951, his life expectancy had been reduced only to 21.63 years. In other words, the uncertainties attendant upon whether he would survive during an additional decade had been resolved in his favor so that when he became 49 years old, his probable life span had been enlarged by 2.73 years. The length of the life span of a person is, of course, the important variable in determining the value of an annuity.

If this decedent had provided for commutation by will or trust instrument, it may well be that commutation as of the date of her death would have been proper. She did not do so. She made no provision for commutation. She gave to her husband an annuity in a specified amount which has

become a vested property right that no court has the power to abridge. All that a court can do is to arrive at a monetary equivalent of the annuity. Not only did the decedent fail to provide for commutation but, as the Referee observed, until the decision by the Appellate Division in 1950, "throughout this litigation no question was ever raised by any of the parties concerning the commutation of the d'Espinay annuity."

It necessarily follows that where commutation is directed by the court and not by the testator or settlor, the date as of which commutation shall be made is the anniversary nearest the date of the court's decree. There could be no such thing as retroactive commutation unless the court had power to make a new will or to change the trust indenture. The court could not direct in its discretion, for instance, that the value of the d'Espinay annuity be reduced by computing it as of the death of his wife in 1941 for the reason (argued in respondent guardian's brief) that he may have imposed upon her by marrying her under an assumed name.

The correct procedure was followed in *Dunham* v. *Deraismes* (*supra*, p. 69) where an annuity payable from the death of a testator had not been paid during 15 years. The court ordered "that the plaintiff recover of the defendants the amount of such annuity which has accrued and is unpaid, and that the said lien may be discharged and satisfied upon paying the present value of the annuity." That is the only manner in which a court is empowered to order commutation.

The Referee erred, I think, in directing that commutation be made as of the anniversary date nearest to the decision by the Court of Appeals upon the former appeal (302 N. Y. 752), instead of the date of the order or judgment to be entered in conformity with his report. It will be recalled that the former decision did not order that this annuity be commuted, but merely held that Special Term would have power to commute it in the proceeding which is now *sub judice*.

Commutation has not been directed by the order or judgment of any court prior to the entry on September 22, 1954 of the order confirming the Referee's report, which is under review. Consequently this annuity should be commuted as of the anniversary date of Mrs. d'Espinay's death which is nearest to the date of the entry of that order, viz., the anniversary which falls on September 19, 1954.

The order appealed from should be modified in accordance with this opinion, and, as so modified, affirmed.

CONWAY, Ch. J., DYE, FULD and BURKE, J. J., concur with DESMOND, J.; VAN VOORHIS, J., dissents in part in an opinion in which FROESSEL, J., concurs.

Order affirmed.

Matter of Harris v. *Guaranty Trust Company;* Opinion of Appellate Division, Reported 286 App. Div. 794 under title *Matter of Ferris.*

Appeals from order of Supreme Court at Special Term (Gavagan, J.) entered September 22, 1954, in the New York County Clerk's office, confirming Final Report of Referee, and from order of Supreme Court (McGeehan, Official Referee) entered in the New York County Clerk's office March 4, 1955, fixing allowances.

BOTEIN, J.:

On a prior appeal in this matter, one of the major issues involved the right of d'Espinay, the settlor's second husband, to take an annuity pursuant to a reserved right of appointment exercised by the settlor (276 App. Div. 990, aff'd without opinion, 302 N. Y. 752). After holding that he was entitled to the annuity, this Court went on to say:

> "As annuitant, d'Espinay does not have any right to elect to take his annuity in a capital sum; but on disclosure of all relevant facts and figures, if the court then deems it advisable for the interests of the children, primary object of the settlor's bounty, the court may compute and determine the

commuted value of the annuity in the hands of the trustee, pay over such capital sum to the annuitant less estate taxes apportioned thereon and after paying the outright appointees, estate taxes and all expenses thereon, distribute the balance discharged of any lien, to the remaindermen or the guardians of their property appointed to receive the same." (276 App. Div. at p. 992).

The matter was referred to a referee for the purpose of taking and stating the account of the substituted trustee and also to report upon a number of other issues. Special Term has confirmed *in toto* the report of the referee, and the first of the two appeals under consideration here is taken from certain provisions of that order of confirmation.

It was adjudged that commutation of the annuity was in the best interests of the settlor's children, who were remaindermen of the trust out of which the annuity is to be paid. Special Term approved the referee's recommendation to commute the annuity as of September 19, 1951, choosing that date because it was the anniversary of the settlor's death nearest in point of time to April 12, 1951. The latter date was when the Court of Appeals affirmed this court's decision that the annuity was valid, and that under certain circumstances (as above quoted) it could be commuted. The annuitant was also awarded the specified yearly instalments for the ten years intervening between the date of the settlor's death and the date of commutation, with interest at the rate earned by the estate.

In fixing the 1951 date the referee in Special Term relied on the holding in *Dunham* v. *Deraismes*, 165 N. Y. 65, 69, 70. It is true that the court held in the *Dunham* case that the lien of the annuity might be discharged by paying its "present value." However, in that case the manner in which the lien of the annuity could be discharged was not litigated expressly, the basic question being whether the annuity itself survived the date that the testator's youngest son reached his majority. Also, at the time the Court of Appeals rendered its decision in the *Dunham* case,

sixteen annual annuity payments had already been made, and a number of other payments subsequently due had accrued but not been paid. Under such circumstances, any commutation of the annuity as of the date of the settlor's death would have had to encompass some formula for crediting the trust estate with the sixteen payments actually made to the annuitant—and such credits might have diminished the commuted value of the annuity to an unconscionable extent. That the court was making a pragmatic decision, dictated by unique circumstances, is evidenced by the fact that on reargument it did not allow interest on the many annuity instalments that were accrued and unpaid prior to the commencement of the action (*Dunham* v. *Deraismes*, 166 N. Y. 607).

The cases cited by the annuitant in which there were references to ascertainment of the present value of the annuities at the termination of the trust would appear to by authority for commutation as of the date the trust ends —which in this case would be the date of the settlor's death (*Buchanan* v. *Little*, 154 N. Y. 147, 152; *People's Trust Co.* v. *Flynn*, 188 N. Y. 385, 392; *Matter of Fenton*, 123 Misc. 658, 666, aff'd 214 App. Div. 754). In each of these cases the present value referred to was the value at the date of death of the settlor. In each instance the court fixed a point of time preceding the termination of the trust involved and looking toward a future point of time when the trust would terminate and the annuity would become commutable.

There are no circumstances in this case that should impel a court to grope for so variable and uncertain a date at which the commuted annuity is to be measured. The date when the Court of Appeals decision was reached, while perhaps reflecting some surface expediency in this particular matter, is too fortuitous as the point for valuation to withstand analysis. In contemplation of law, once the Court of Appeals had decided that the annuity was valid, its validity was established not from the date of decision but as of the date that the settlor testatrix died. "It has long been the settled rule that in case of a will, if no time is fixed, an annuity given thereby commences

from the day of the testator's death, and the first payment is to be made at the end of twelve months from that time" (*Kearney* v. *Cruikshank*, 117 N. Y. 95, 100).

The date of the settlor's death provides a precise and easily fixed point of time for ascertaining the value of an annuity. Furthermore, it affords no scope for delay, derangement or maneuvering by litigants, as might a date hinging upon a decision by an appellate court. Inequities may be brought to pass by the passage of time, but they do not justify *ad hoc* treatment. As was stated in a somewhat similar context: "Tempting as it is to correct uncertain probabilities by the now certain fact, we are of the opinion that it cannot be done, but that the value of the wife's life interest must be estimated by the mortality tables. Our opinion is not changed by the necessary exceptions to the general rule specifically made by the Act." (*Ithaca Trust Co.* v. *United States*, 279 U. S. 151, 155).

The annuity should be commuted as of the date of settlor's death, namely, September 19, 1941, payable with interest at six per cent from that date.*

The substituted trustee kept substantial principal and income cash balances on deposit with itself as a banking institution during the accounting period. No claim is made that in so doing it acted wrongfully or improperly. In fact, such practice is authorized explicitly by the provision of §100-b, subd. 1, Banking Law. The guardians of the infant remaindermen contend that the trustee is liable for interest on the self-deposits. Upon recommendation of the referee Special Term charged the trustee with interest at the rate of ¾ of 1% per annum on such balances.

There is no statutory requirement for the payment of interest by an *inter vivos* trustee, although there is such a provision for payment by court-appointed fiduciaries (§100-b, subd. 4, Banking Law). The referee relied on *Herzog* v. *Title Guaranty & Trust Co.*, 148 App. Div. 234, modified on other grounds and affirmed 210 N. Y. 531, interpreting that case as holding that even in the absence

* The balance of the opinion deals with issues not raised by this petition.

of any statutory provision requiring the payment of interest on self-deposited funds of an *inter vivos* trust, the trustee was nevertheless required to allow a fair rate of return on the trust cash balances. The trustee in the *Herzog* case appears to have been held responsible only for the rate of interest customarily paid by banks on similar types of deposit (p. 236). The opinion is not authority for surcharging a corporate trustee with interest on proper and appropriate self-deposits, where no market value for the interest on such deposits has been established (see also Scott on Trusts, §170.18; Bogert Trusts and Trustees, Vol. 3, Part 2, §598; cf., *Matter of McKay*, 5 Misc. 123, 133; *Matter of Scudder*, 21 Misc. 179, 187; *Matter of People's Trust Co.*, 169 App. Div. 699, 700).

There was just such a prevailing rate for interest in the period covered by the accounting in the *Herzog* case, because of competitive practices existing at that time; and the trustee was held only to the payment of such customary rate. However, the referee in this case has explicitly found that the custom of paying interest on bank deposits no longer prevailed among commercial banks in the accounting period under consideration here. It was because of the absence of such a custom that he recommended surcharging the trustee at the minimum rate of interest that trust companies acting as court-appointed fiduciaries must pay (§100-b, subd. 4, Banking Law).

The surcharge of interest on the cash balances held in the trust is improper and cannot be sustained.

The order of September 22, 1954 is modified to conform with the foregoing and otherwise affirmed. Settle order on notice.

The second appeal is from an order by an Official Referee designated to hear applications for allowances and to determine the reasonable value thereof. When the matter of interim allowances in this case previously came before this court, we said of certain applicants that "[t]he matter of their allowances should wait until the proceedings are substantially terminated, so that the full measure of their success, as well as the benefits, if any, to the estate or

fund and the entire cost of the litigation may be ascertained or at least approximated." (277 App. Div. 1031). In the present posture of the case this injunction holds true for all applications for allowances.

The applications under review now were referred to an Official Referee in the expectation, perhaps too sanguine, that the proceedings had been "substantially terminated." Developments subsequent to that referral give no such assurance. As pointed out by counsel for d'Espinay, there have been further proceedings and appeals since the periods covered by the present applications—and there may be still more.

Therefore, the allowances are prematurely made and their fixation should be deferred until this bitter, protracted and expensive litigation has finally ended. The reference should be held open, so that there will be no need to duplicate the extensive proof already submitted to the Official Referee; and upon the conclusion of this litigation the applicants may, if they deem it appropriate, revise their requests and submit additional proof. In this respect we call to the attention of the applicants the previously expressed presentiments of the court about the ultimate expenses to the trust beneficiaries (277 App. Div. 1031).

The order of the Official Referee dated March 3, 1955 should be modified accordingly. Settle order.

PECK, P. J., COHN and RABIN, J. J., concur.

COX, J., dissents in part in a separate opinion.

COX, J. (dissenting in part):

I concur in the majority opinion except insofar as it adopts the findings of the referee in connection with the formula to be used in apportioning the federal estate tax and the tax interest. As of the date of death of the settlor, the trust assets had a total value of $1,815,700.94. The settlor was a non-resident and, under the tax compromise agreed upon herein, the United States Treasury bonds in

the sum of $228,487.40 were considered non-taxable. Thus, the gross taxable estate was $1,587,213.54. The gross administration expenses, as sanctioned by the tax authorities, totalled $73,815.15. On this amount, $64,534.12, being the portion of the administration expenses allocable to the taxable assets, was allowed as a deduction. The balance of $9,281.03, the amount allocable to the non-taxable assets, was not allowed as a deduction. Thus, the trust assets subject to federal estate tax under the terms of the tax compromise had a value of $1,522,679.42. The referee determined the formula to be: The value of the annuity as the numerator of the fraction and, for the denominator, he deducted from the gross estate the total administration expenses of $78,815.15. However, he included the non-taxable treasury bond in the sum of $228,487.40; the denominator of his fraction thus became $1,741,885.79. This formula does not comply with Section 124, Decedent Estate Law. The correct formula should be the value of the annuity as the numerator and the net taxable estate amounting to $1,522,679.42 as the denominator. The Court stated (*In re Kaufman's Estate*, 170 Misc. 436):

> "The court is bound by the actual fact of inclusion or exclusion of property by the taxing authorities. • • • The court is not a reviewing body. It may not say that something else should have been done by the taxing authorities that in fact was done. It takes the accomplished fact of taxation and then allocates the burden on the basis of actuality of tax."

The referee's determination disregards the actuality of the tax imposed upon the trust estate.

The referee used the same formula as above in determining the tax interest to be paid by the annuitant. His determination on this point should be modified.

I dissent in reference to the allocable tax and the interest thereon and vote to modify the referee's report in accordance herewith.

APPENDIX B

	Commuted Amount	Accrued Instalments of Annuity	Deduction of Estate Tax Principal	Deduction of Estate Tax Interest	Addition of Interest on Commuted Amount	Addition of Interest on Accrued Instalments	Gross Amount Before United States Income Tax	Annuitant's United States Income Tax Liability	Net A to Ann
1. Retroactive commutation as of September 19th, 1941 with interest at 6% as ordered by the Court of Appeals of the State of New York.	$347,025.00	—	$94,449.27	$11,299.84	$242,472.70(1)	—	$483,748.59(2)	$184,641.30(3)	$299
2. Commutation as of September 19th, 1954, with interest at 6%, being "present" commutation as "directed" by minority of Court of Appeals.	306,375.00	$325,000.00(5)	94,449.27	11,299.84	38,146.63(6)	168,689.30(7)	732,461.82(8)	152,262.48(3)	58

NOTES

1. Interest at 6% from September, 1941 to September, 1957 on $347,025.00 minus $97,449.27 tax, i.e. $252,575.73.
2. Net commuted amount ($252,575.73) plus interest of $242,472.70 minus interest on estate tax of $11,299.84.
3. United States Income Tax for non-resident alien at prevailing rates on interest allowed by New York Court of Appeals less estate tax interest ordered to be charged to annuitant.
4. Accrued to September, 1957.
5. Accrued to September, 1954.
6. Interest at 6% on net commuted amount from September, 1954 to September, 1957.
7. Interest at 6% on instalments from 1941 to 1954 (13 years) of $21,626.81 ($25,000.00 less $3,373.19 tax amortization).
8. Commuted amount plus accrued instalments plus addition of interest on commuted amount and on instalments minus estate tax and minus interest on estate tax.

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e on with 6% by f the	$347,025.00	—	$94,449.27	$11,299.84	$242,472.70(1)	—	$483,748.59(2)	$184,641.30(3)	$299,107.29(4)
on t g n d" y of peals.	306,375.00	$325,000.00(5)	94,449.27	11,299.84	38,146.63(6)	168,689.30(7)	732,461.82(8)	152,262.48(3)	580,199.34(4)

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6. Interest at 6% on net commuted amount from September, 1954 to September, 1957.
7. Interest at 6% on instalments from 1941 to 1954 (13 years) of $21,626.81 ($25,000.00 less $3,373.19 tax amortization).
8. Commuted amount plus accrued instalments plus addition of interest on commuted amount and on instalments minus estate tax and minus interest on estate tax.

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JOHN T. PEY, Clerk.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1957.

No. 524.

CHARLES LOUIS d'ESPINAY-DURTAL,
Petitioner,

against

JOHN WAKEFIELD HARRIS and ELIZABETH MARSHALL HARRIS, Infants, by IRVING DROUGHT HARRIS, their Guardian *ad litem;* GUARANTY TRUST COMPANY of NEW YORK, as Trustee; ANTHONY J. ROMAGNA, Guardian *ad litem* of CHANTAL LOUISE MARIE FRANÇOISE d'ESPINAY, Infant; THOMAS W. CORLEY; HERVE NEAU; JESUS ARRUTIA; ANNA ARRUTIA; MARGUERITE ARRIETA; THERESE ARRIETA; A. J. HITCHMAN-ILES, as Executor of the Last Will and Testament of HENRIETTA FERRIS; THOMAS BYRON GILCHRIST, as Ancillary Executor of the Last Will and Testament of JEAN FERRIS d'ESPINAY-DURTAL; ROBERT M. COWEN, as Ancillary Executor of JOSEPHINE GROVE,
Respondents.

PETITIONER'S REPLY BRIEF.

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Respondents.

PETITIONER'S REPLY BRIEF.

The Federal question passed upon by the Court of Appeals of the State of New York is "whether the retroactive commutation of appellant Charles Louis d'Espinay-Durtal's annuity as of the date of his wife's death violated his rights under the Fourteenth Amendment."[1]

The briefs of both petitioner and respondent make it crystal clear that this question is a substantial and novel one which has not been passed upon by this Court.

---

[1] Petition for Certiorari, p. 3

Petitioner has presented two separate arguments for his claim that he has been deprived of property without due process of law:

1. The courts of New York do not have the power to commute petitioner's annuity since the controlling statute as it existed in 1941 (the date upon which petitioner's rights to the said annuity became vested) permitted commutation only upon the consent of the party entitled to the annuity;

2. Assuming arguendo the power of the courts of New York to commute petitioner's annuity, commutation cannot be retroactive.

Respondents have cited cases upholding the power of New York courts to commute annuities in appropriate cases (none similar to the case at bar) in support of the proposition that the courts may order retroactive commutation (pp. 6 and 9, Respondents' brief). However, not a single authority permitting retroactive commutation has been cited in respondents' brief, because there are none.*

Ithaca Trust Co. v. United States, 279 U. S. 151 is the only case cited by respondents (their brief p. 9) to substantiate the legality of retroactive commutation. The case is wholly inapposite. It deals solely with the method for valuing an annuity for Federal estate tax purposes and does not deal even remotely with the power of the court to direct commutation either presently or retroactively. Thus the argument set forth at pp. 11 to 14 in the petition for certiorari, to the effect that retroactive commutation will deprive petitioner of his constitutional rights without due process of law, remains unanswered by respondents.

---

* Footnotes 11, 12 and 13, p. 14 Petition for Certiorari.

For the reasons set forth in the petition for a writ of certiorari and in this reply brief, the writ should be granted.

Respectfully submitted,

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Respondents.

BRIEF ON BEHALF OF JOHN WAKEFIELD HARRIS, ELIZABETH MARSHALL HARRIS AND ANTHONY J. ROMAGNA, AS GUARDIAN AD LITEM OF CHANTAL L. M. F. D'ESPINAY, INFANT, IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

WILLIAM T. GRIFFIN,
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B. There is no substance in the federal question presented by Question 2. The decision of the Court of Appeals of the State of New York did not turn on the construction of a statute and there was neither a retroactive application of any statute nor a departure from any settled rule of property in violation of the Fourteenth Amendment to the Constitution of the United States. 7

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OCTOBER TERM 1956

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against

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Respondents.

Questions Presented

Question 1 was not urged in petitioner's application to the Court of Appeals for an amended remittitur and is not properly presented here. Petitioner does not claim that it was raised in the appeals prosecuted in the New York appellate courts (Petition at p. 2).

The amended remittitur of the Court of Appeals of the State of New York (Petition at p. 3) shows that the sole

question presented is whether the retroactive commutation of petitioner's annuity as of the date of his wife's death, violated his rights under the Fourteenth Amendment to the Constitution of the United States.

Statutes Involved

There is no statute involved in this cause. Petitioner's statement of Rule 30 of the Rules of Civil Practice of the State of New York is incomplete and misleading in that it omits the catchline and the reference to the title of which Rule 30 is a part and the entire first paragraph. Moreover, petitioner misquotes the paragraph printed at page 4 of his petition by substituting "such petitioner" for the correct words "such party." The text of Rule 30, correctly cited, shows that it is referable only to the administration of funds deposited into court in connection with a tender prior to suit. The annuity here involved is payable out of the principal and income of an *inter vivos* trust, which has not been deposited in any Court.

Rule 30 is part of a section of the Rules of Civil Practice embracing six rules (Rules 29-34 entitled "Tit. 5—Payment into Court"). In 1941, Rule 30 read as follows:

> "RULE 30. ADMINISTRATION OF COURT FUNDS; GROSS SUM IN LIEU OF INCOME:
>
> "When a party is entitled to the yearly interest or income of *any sum paid into court* and invested in permanent securities, he shall be charged with the expense of investing such sum and of receiving and paying over the interest or income thereof.
>
> "If such party consent to accept a gross sum in lieu of yearly interest or income for life of a sum of money paid into court for his benefit (except in case of dower which is provided for by rule two hundred and forty-three), the same shall be estimated according to the then value of an annuity at the

rate of five per centum on the principal sum, during the probable life of such person, according to the American Experience Table of Mortality.'" (Italics supplied)

After amendment in 1948 Rule 30 read, and still reads, as follows:

"RULE 30. ADMINISTRATION OF COURT FUNDS: GROSS SUM IN LIEU OF INCOME.

"When a party is entitled to the yearly interest or income of *any sum paid into court* and invested in permanent securities, he shall be charged with the expense of investing such sum and of receiving and paying over the interest or income thereof.

"If a gross sum is payable to a party in lieu of yearly interest or income for lieu of a sum of money paid into court for his benefit (except in case of dower which is provided for by rule two rundred and forty-three), such sum shall be calculated according to the then value of an annuity at the rate of four per centum on the principal sum, compounded annually during the probable life of such person, according to the American Experience Table of Mortality, together with Craig's extension thereto for ages under ten. If in any case, such tables fail to provide required data, other tables accepted by actuarial practice may be employed.[2] (Italics supplied)

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[1] CLEVENGER'S Practice Manual, 1941 annual

[2] CLEVENGER'S Practice Manual, 1957 Annual

ARGUMENT

A. The decision by the Court of Appeals of the State of New York does not raise a federal question involving the impairment of a contract under Article I, Section 10 of the United States Constitution. That Section does not apply to judicial decisions, under the circumstances presented. Moreover, no question regarding the impairment of a contract was raised in the Courts of the State of New York.

i

Petitioner claims a statutory right, as an annuitant, to installment payments rather than the commuted principal value as of the date of settlor's death (Petition at pp. 3, 11). The principal thrust of the petitioner's argument is that his rights to installment payments became vested in 1941 and the commutation of his annuity, without his consent, was expressly prohibited by Rule 30 of the Rules of Civil Practice of the State of New York (Petition at p. 11).

The plain facts are these: there was and is no statutory right involved in this case; petitioner incorrectly relies upon Rule 30 of the Rules of Civil Practice; commutation of an annuity in New York is a matter of judicial discretion and is neither restricted nor proscribed by any statute; and the Court of Appeals did not rest its decision upon Rule 30 (Petition, App. A, pp. i-iv).

Petitioner's complaint is, in fact, directed to an adverse judicial decision. There is no "law" involved.[3] Accord-

[3] Rule 30 was not relied upon by the Referee or the New York Courts as a basis of judicial power to direct commutation (R. Vol. 1, pp. 141-149; *Matter of Harris*, 276 App. Div. 900; App. A of Petition, pp. i-xv).

ingly, his reliance upon Article I, Section 10 of the Constitution of the United States is misplaced. (*Tidal Oil Co.* v. *Flanagan*, 263 U. S. 444 (1924); *Columbia R. Gas & E. Co.* v. *South Carolina*, 261 U. S. 236 (1923); *McCoy* v. *Union Elev. R. Co.*, 247 U. S. 354 (1918); *Long Sault Development Co.* v. *Call*, 242 U. S. 272 (1916); *Detroit United R. Co.* v. *Michigan*, 242 U. S. 238 (1916); *Ross* v. *Oregon*, 227 U. S. 150 (1913); *Hanford* v. *Davies*, 163 U. S. 273 (1896); *Central Land Co.* v. *Laidley*, 159 U. S. 103 (1895); *New Orleans Waterworks Co.* v. *Louisiana Sugar Ref. Co.*, 125 U. S. 18 (1888).)

Indeed, petitioner acknowledges that "the constitutional guarantee against the impairment of contracts discussed in paragraphs 1-3 above applies only to legislative action" (Petition at pp. 11-12).

ii

Moreover, there is no contract involved in this case. Petitioner's right to the annuity did not arise out of a contract either between the State of New York and the petitioner, or between the trustee and the petitioner (*Brearley School* v. *Ward*, 291 N. Y. 358, 364, 94 N. E. 1001 (1941)). Rights of succession to property, whether by will or intestacy do not create contract rights (*United States* v. *Burnison*, 339 U. S. 87 (1950); *Irving Trust Company* v. *Day*, 314 U. S. 556 (1942)). Article I, Section 10, does not apply to alleged vested rights which are not referable to an agreement. (*Crane* v. *Hahlo*, 258 U. S. 142, 145-146 (1922); *Morley* v. *Lake Shore & M.S.R. Co.*, 146 U. S. 162, 169 (1892); *Louisiana ex rel. Folsom* v. *New Orleans*, 109 U. S. 285, 288 (1883); *Charles River Bridge Co.* v. *Warren Bridge Co.*, 11 Pet. 420, 539-540 (1837); *Satterlee* v. *Matthewson*, 2 Pet. 380, 413 (1829); *Wright, The Contract Clause and the Constitution* (1938).)

iii

There is a further bar to petitioner's claim that Question 1 is properly presented to this court. The opinion of the Court of Appeals reviews the litigation and prior appeal in this case (Petition, App. A, pp. ii-iii). On the first appeal, the Appellate Division of the Supreme Court of the State of New York (*Matter of Harris*, 276 App. Div. 990, 995 (1950), held that the court "may compute and determine the commuted value of the annuity in the hands of the Trustee, pay over such capital sum * * *" and thus discharge the lien of petitioner's annuity. No appeal was taken by petitioner from that determination to the Court of Appeals of the State of New York. The Court of Appeals then affirmed the order of the Appellate Division (302 N. Y. 752, 98 N. E. 2d, 884 (1951)).[4] No appeal was taken from that determination to the Supreme Court of the United States. Petitioner is now concluded from challenging the determination, by the Court of Appeals of New York, that commutation may be ordered without petitioner's consent. As this Honorable Court pointed out in *Angel* v. *Bullington*, 330 U. S. 183, 189 (1947):

> "If a litigant chooses not to continue to assert his rights after an intermediate tribunal has decided against him, he has concluded his litigation as effectively as though he had proceeded through the highest tribunal available to him."

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[4] The record shows that petitioner failed to appeal in 1950 from the order in *Matter of Harris*, 276 App. Div. 990, which authorized commutation without his consent. The Referee noted the failure of the petitioner to appeal from the order and stated that affirmance by the Court of Appeals was a "binding adjudication on the question of the authority of the court * * * to decree commutation in the exercise of its discretion" (R. Vol. I, p. 149). Contrary to petitioner's contention (Petition at p. 9), the Referee reported that the Court had the power to commute the annuity without petitioner's consent and independent of reference to any statute (R. Vol. I, pp. 141-149).

Finally, the amended remittitur of the Court of Appeals (Petition at p. 3) makes no reference to Article I, Section 10. This Honorable Court has held that it will consider only federal questions which were necessary to the decision of the State Court or passed upon by the State Court. (*Wilson* v. *Cook*, 327 U. S. 474, 482 (1946); *New York ex rel. Cohn* v. *Graves*, 300 U. S. 308 (1937); *Keokuk & Hamilton Bridge Company* v. *People of the State of Illinois*, 175 U. S. 626 (1900); *Dewey* v. *Des Moines*, 173 U. S. 193 (1899)).

It is clear, therefore, that Question 1 is not presented and that there is not even the substance of a federal question involved in this appeal. Petitioner's disingenuous attempt to equate a right to an annuity with a contract obligation cognizable under Article I, Section 10 of the Constitution is exposed by an analysis of the opinion of the Court of Appeals of the State of New York and by the concessions which abound in the petition.

B. There is no substance in the federal question presented by Question 2. The decision of the Court of Appeals of the State of New York did not turn on the construction of a statute and there was neither a retroactive application of any statute nor a departure from any settled rule of property in violation of the Fourteenth Amendment to the Constitution of the United States.

Petitioner alleges a statutory right to annual payments of an annuity and a "present commutation" (Petition at p. 12). Elsewhere, petitioner inconsistently urges a contract right, under Rule 30 of the Rules of Civil Practice, to prevent commutation of his annuity without his consent and, consequently, the unqualified right to receive installment payments throughout his lifetime (Petition at p. 11). In substance, petitioner incorrectly states that under Rule

30 of the Rules of Civil Practice, his annuity cannot be commuted without his consent. Petitioner then compounds his error by arguing that the Court of Appeals retroactively applied an amendment to Rule 30, adopted in 1948, and, consequently, invaded his rights under the Fourteenth Amendment to the Constitution.

It has already been shown that the decision of the New York Courts did not rest upon Rule 30 or even consider it. Petitioner acknowledges this fact, but in an effort to probe the judicial mind, hypothesizes that the New York courts "must have acted under that statute" (Petition at p. 9). This is, manifestly, an erroneous guess. Rule 30 of the Rules of Civil Practice has nothing whatever to do with commutation of an annuity payable out of an *inter vivos* trust in the circumstances of this case. Rule 30 is a rule of adjective law designed to govern procedure in the courts of the State of New York. Rule 30 is restricted to the administration of funds deposited into court in connection with a tender prior to institution of suit.[5] It prescribed and prescribes a method for the payment of interest or income on moneys deposited into court. The reference to "annuity" in Rule 30 is designed only to furnish the technique or method for computing the payment to be made out of the funds deposited in court. The Fourteenth Amendment is not applicable to forms of procedure in the State courts nor does it regulate practice therein (*Holmes* v. *Conway*, 241 U. S. 624 (1916); *Louisville & N. R. Co.* v. *Schmidt*, 177 U. S. 230 (1900)).

The incontrovertible fact is that there is neither a statute nor a settled rule of substantive law which creates a vested right to receive annual installments of the annuity, rather than the commuted capital value (*Demorest* v. *City Bank Farmers Trust Co.*, 321 U. S. 36 (1944)).

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[5] § 174-a—§ 174-c of the Civil Practice Act of the State of New York (L. 1949, ch. 208).

In 1941, at the time of the settlor's death, the law of the State of New York clearly vested in the courts the discretion to commute annuities (*People's Trust Co.* v. *Flynn*, 188 N. Y. 385, 393 (1907); *Buchanan* v. *Little*, 154 N. Y. 147, 152 (1897).* There has been no change in this law since 1941 either by statute or by decision.

There was, in short, no statute or rule of law which would prevent the commutation of petitioner's annuity in 1941 or which required his consent. In 1941, the decisional law of the State of New York clearly contemplated and sanctioned the commutation of annuities. The rights which vested in petitioner at the date of settlor's death were the rights which existed under the laws of the State of New York, namely, a right to receive installment payments of the annuity or, in the discretion of the court, the commuted capital value.

While in a proper case, an annuitant might elect to take the capital sum necessary to provide an annuity (*In re Cole's Estate*, 219 N. Y. 435, 114 N. E. 785 (1916); *In re Foster's Estate*, 174 Misc. 933, 22 N.Y.S. 2d 252 (1940); *In re Oakley's Will*, 142 Misc. 1, 254 N.Y.S. 306 (1931)), the existence of such a right on the part of the annuitant does not, by inference or otherwise, foreclose the right of a State Court in a case such as the one at bar, from commuting an annuity as of the date of death of the settlor and, in so doing, to resort to mortality tables (*Ithaca Trust Co.* v. *United States*, 279 U. S. 151, 155).

The decision by the Court of Appeals in this case did not overrule or modify an earlier contrary opinion by the Courts of New York. Contrary to petitioner's contention

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* *Buchanan* v. *Little*, *supra*, was decided in 1897 and *People's Trust Co.* v. *Flynn*, *supra*, in 1907. Rule 30 has existed in substantially the same form for over 100 years (*Gilbert and Bliss*, Editorial Notes to Rule 30). Yet Rule 30 is not mentioned in either of these cases. Thus it is clear that the Court's power to commute is not dependent on statute.

(Petition at p. 14, footnote 12), the four cases cited by him did not establish a rule of substantive property law proscribing commutation of this annuity. The New York Courts, after analyzing the four cited cases, so held (Petition, App. A., pp. x-xi).

Petitioner also misreads *Kearney* v. *Cruikshank*, 117 N. Y. 95 (1889)[1] and *Matter of Toms*, 84 Misc. 312 (1914). Neither case makes any reference to commutation; nor does either case decide or even suggest whether or not the date of death may be resorted to for purpose of commutation. Finally, petitioner says (Petition at p. 9) that in *Matter of Maybaum*, 296 N. Y. 201 (1947), the Court of Appeals reversed the Appellate Division because of the failure of the latter court to consider Rule 30 of the Rules of Civil Practice. Rule 30 was neither adverted to nor considered nor was there, in that case, any decision on the power of the court to direct commutation.

In short, the decision in the instant case resolves a question of local law and, as such, should be accepted as controlling by this Honorable Court. *American Railway Express Company* v. *Commonwealth of Kentucky*, 273 U. S. 269, 272-3 (1927).

Even if it be assumed, *arguendo*, that the Court of Appeals of New York erroneously decided the case, this does not raise a federal question under the Fourteenth Amendment (*Arrowsmith* v. *Harmoning*, 118 U. S. 194 (1886)). Petitioner has not been deprived of his right to an annuity under the trust. On the contrary, he is receiving what the law of New York allows to annuitants: He may, as a consequence of the decision by the Court of Appeals, receive less than the amount to which he claims

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[1] Parenthetically, it may be noted that the basic principle of this case was reversed by statute. (Surrogate's Court Act, Section 204, Real Property Law, Section 17(e)).

to be entitled.[8] But this does not constitute a violation of his rights under the Fourteenth Amendment. As this Court said in *Tracy* v. *Ginzberg*, 205 U. S. 170, 178 (1907):

> "The decision of a state court, involving nothing more than the ownership of property, with all parties in interest before it, cannot be regarded by the unsuccessful party as a deprivation of property without due process of law, simply because its effect is to deny his claim to own such property * * *."

Finally, what has been said in the portion of this brief under point "A" (p. 6, *supra*) concerning the petitioner's failure to appeal from the original order authorizing commutation without his consent, applies with equal force to petitioner's claim of a deprivation of rights under the Fourteenth Amendment occasioned by commutation without his consent (*Angel* v. *Bullington*, *supra*, p. 6).

Petitioner's claim of inequitable treatment attributable to "retroactive" commutation is specious not only because Rule 30 is not involved, but because he is prepared to accept the "retroactive" commutation offered by the minority opinion in the Court of Appeals. The minority, writing on May 24, 1957, proposed commutation as of September 19, 1954 (Pet. App. A, p. xiv), a "retroactive" period of two years and eight months.[9]

The Court of Appeals disposed of the claim of retroactivity in these succinct words:

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[8] If petitioner had died in 1942, for example, after his annuity had been commuted and paid in 1941, his estate would have kept the commuted value and not merely the single installment. Under such circumstances, the respondents could not have recovered the excess amount (Pet. App. A, p. IV).

[9] Though dates for commutation, other than date of death, were suggested first by the Referee (R. Vol. I, p. 161, f. 483) and there-

(*Continued on following page*)

"The commutation here was 'retroactive' in the sense only that intervening litigation postponed, but did not change as to amount, the payment of the commuted principal sum." (Pet. App. A. p. iv)

"The law has recompensed this annuitant for the delay, as it recompenses other litigants in other situations, by allowing him interest at the full legal rate." (Pet. App. A, p. iii)

Conclusion

The petition fails to suggest even the substance of a federal question (*Demorest* v. *City Bank Farmers Trust Co.*, 321 U. S. 36, 49 (1944), concurring opinion of Douglas, J.). There is no conflict of decisions to be resolved and no issue which calls for decision by this Honorable Court.

The petitioner's case is grounded on two illusory propositions: a statute which has no pertinency to the issues involved and a conception of vested rights which finds no support in the statutory or decisional law of the State of New York. Neither Article I, Section 10 of the Constitution nor the Fourteenth Amendment is properly invoked.

(*Continued from preceding page*)

after by the two minority judges of the Court of Appeals (Pet. App. A, p. ix), both dates were "retroactive" to a lesser degree but in the same sense that petitioner uses that term when he refers to the date of death. The Referee reported on April 14, 1953 (R. Vol. I, p. 93). He recommended commutation as of September 19, 1951 (R. Vol. I, p. 161). Thus his date was "retroactive" by one and one-half years. The Special Term agreed with his date (R. Vol. I, p. 80, f. 238), making its order of September 22, 1954 (R. Vol. I, p. 24, f. 70). So that its commutation date was "retroactive" by over two years. The two minority judges of the Court of Appeals writing on May 24, 1957 (3 N. Y. 2d 70; Pet. App. A, p. i), concluded that the date should be September 19, 1954 (Pet. App. A, p. ix). Their choice, therefore, was "retroactive" by two years and eight months.

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be denied.

Respectfully submitted,

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Dated, New York, October 28, 1957.